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### NOTES OF CASES.

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**Power of Courts to Order Exhumation of Dead Bodies.**—In a recent well-considered case in West Virginia the question was presented whether a court can, on a murder trial, at the motion of the accused, order the dead body of the victim of the crime to be exhumed for examination for the purpose of evidence on the trial. *State v. Highland* (W. Va., Oct. 15, 1912), 76 S. E. 140. In other words, can the court, without the consent of the kindred of the dead, invade the sacred precincts of the cemetery and tear open the grave, and lacerate afresh the hearts of those that loved him and to whom his memory is sacred in death. It is true that Diogenes and his disciples regarded burial with contempt and held it unimportant whether bodies be burned by fire or devoured by beasts, birds, or worms. But enlightened nations and the secular jurisprudence of civilized countries in our day regard the grave and its body in higher esteem, and there is an instinct planted by nature in the human breast to feel a strong aversion—almost horror—at the desecration of the grave. With what reverence do we all regard the graves of our dead, and at each returning spring cover them with flowers! Even the conquering Moslem respected the graves of Abraham, Isaac and Jacob, and Sarah, Rebekah and Leah, their wives, by abstaining from the removal of their bodies from Macphelah, when building a mosque. See Genesis XLIX, 31. But however this may be the courts cannot sacrifice the ends of justice to mere sentiment or emotion, or allow such feelings to stand in the way of the court's securing a full disclosure of the exact truth. See Wigmore on Evidence, § 2220; Preliminary Treatise on Evidence by Prof. Thayer of Harvard (1898); 2 Century's Growth of American Law (1701-1901) by the Faculty of the Yale Law School under the title of Evidence.

Should the courts lay down, without reservation, that the accused had no right to demand the exhumation he would in some cases be deprived of his sole means of establishing his innocence. Accordingly, the true rule seems to be that a court may order the body of a deceased person to be disinterred for evidentiary purposes, provided the disinterment is *absolutely essential to justice*, *Granger's Life Insurance Company v. Brown*, 57 Miss. 308, 34 Am. Rep. 446, 14 Ann. Cas. 471; *Cohen v. Congregation*, 114 App. Div. 177, 99 N. Y. S. 732; and provided further, the motion for disinterment is not delayed so long that decomposition would render it uncertain whether there could be gained from the examination of the body any valuable evidence. *Granger's Life Insurance Company v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *State v. Highland* (W. Va.) 76 S. E. 140. (Application for disinterment nine months after burial too late.)

In *Gray v. State*, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513, a murder trial, it is held that neither the right of sepulture

nor the right to have the body remain untouched and unmolested is an absolute right; but these rights must yield when they conflict with the public good, or where the demand of justice requires such subordination. The court said that the trial court, in proper cases of imperative necessity, has inherent power to order disinterment of a body in trials for murder to ascertain the truth respecting the homicide, in due administration of justice, at the instance of either the state or of the prisoner. The court said: "The power inheres in such court, or there is, in such a case as here presented, no such authority anywhere. It would, of course, be conceded that such a request ought not to be granted, either on application of the state or the defendant, lightly or inconsiderately; nor in any case unless such course was absolutely essential to the administration of justice. Every consideration of respect for the dead and a proper sense of regard for the court's authority and dignity would suggest that the pathetic dust of the deceased should remain undisturbed until called before the great Judge at the Final Assize, unless justice required a disinterment."

Statutes making it an offense to disinter a body without lawful authority do not apply to public examinations made by legally constituted authorities for the purpose of ascertaining whether crime has been committed in producing the death of the person whose body is exhumed, although some of the proceedings by the officer under whose directions the examination was made were irregular. *People v. Fitzgerald*, 105 N. Y. 146, 59 Am. Rep. 483; *Harmer v. Broder*, 78 Wis. 483.

But it is well settled that this right of exhumation is not an absolute right, but rests in the sound discretion of the court, and its refusal to make such order is, as a rule, not reviewable. *Moss v. State*, 152 Ala. 30, 44 So. 598; *State v. Highland* (W. Va.), 76 S. E. 140.

In conclusion, it must be borne in mind that the rule governing the courts in granting a motion of this nature should always be the rule of imperative necessity to meet the ends of justice to justify overriding the feelings of the friends and relatives of the deceased. The maxim "Requiescat in pace" should be regarded by the courts as engraven on every headpiece.

The great dramatist impressively speaks this tender emotion in the prayerful epitaph written by his own hand for his tombstone:

"Good friend, for Jesus' sake forbear  
To dig the dust enclosed here;  
Blest be the man that spares these stones,  
And cursed be he that moves my bones."

**Right of Executors to Secure Exhumation.**—It has been held, however, that a court has no power to order the exhumation of a dead body in an action at law to which the widow of the deceased, who